No. 02-247

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IN THE

Supreme Court of the United States

UBS PAINEWEBBER INC. AND RICHARD WILHELM,

Petitioners,

v.

ALFRED COHEN, EXECUTOR OF THE ESTATE OF SAMUEL GINSBURG,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR HAMILTON COUNTY, OHIO

REPLY BRIEF FOR PETITIONERS

JEFFREY S. SUTTON
Counsel of Record
JEFFREY J. JONES
DOUGLAS M. MANSFIELD
BRIAN G. SELDEN
JONES, DAY, REAVIS & POGUE
41 South High Street, Suite 1900
Columbus, Ohio 43215
(614) 469-3855

Counsel for Petitioners

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REPLY BRIEF FOR PETITIONERS

In its petition, UBS PaineWebber, Inc. f/k/a PaineWebber Incorporated ("PaineWebber") showed a recurring and growing trend among state courts, including the lower court here, to use common law and state "public policy" to limit the enforceability of arbitration agreements under the Federal Arbitration Act ("FAA"). PaineWebber showed that this common law trend represents the apparent successor to prior efforts by state legislatures to roll back the federal policies favoring arbitration embodied in the FAA. And PaineWebber showed that this trend, developed in the lower court as an intentional-tort exception to enforceability under the FAA, will (if unchecked) undermine alternative dispute resolution from New York to California.

Respondent, understandably, takes a different tack. But his arguments in the end confirm rather than dispel the need for review. In proposing to make arbitrability turn solely on how claims are pleaded, respondent would allow both the creativity of a party's lawyer and judicially-created "public policies" to trump Congress's expressed pro-arbitration requirements in the FAA. For these reasons, those set forth in the petition, and those elaborated below, PaineWebber respectfully submits that this issue warrants the Court's immediate attention or at a minimum summary reversal.

1. At no point does respondent raise a jurisdictional impediment to reviewing the question presented. A final, appealable order is in place, and there is no independent and adequate state ground precluding review.

2. Respondent, tellingly, does not meaningfully deny that a sharp and growing division of authority exists between the (primarily federal) courts that compel arbitration on intentional-tort claims and the state judiciaries that are innovating intentional-tort exceptions to the FAA. Indeed, in trying to distinguish (at 8-9) the federal intentional tort cases from his own case based on the specific torts pleaded, respondent all but acknowledges the broader split. Unlike the

lower court here, the federal courts of appeal agree that when an arbitration clause encompasses "any and all" controversies between two parties, the FAA ensures that the agreement to arbitrate extends to intentional tort claims, no matter how they are pleaded. *See, e.g., Pers. Sec. & Safety Sys., Inc. v. Motorola, Inc.*, No. 01-11040, 2002 WL 1413702, at *4 (5th Cir. 2002); *LaPrade v. Kidder, Peabody & Co.*, 246 F.3d 702, 705 (D.C. Cir. 2001); *Harter v. Iowa Grain Co.*, 220 F.3d 544, 549 (7th Cir. 2000); *Brown v. Coleman Co.*, 220 F.3d 1180, 1184 (10th Cir. 2000); *Wood v. Prudential Ins. Co. of America*, 207 F.3d 674, 681 (3d Cir. 2000); *Am. Recovery Corp. v. Computerized Thermal Imagery, Inc.*, 96 F.3d 88, 90 (4th Cir. 1996); *Sweet Dreams Unlimited, Inc. v. Dial-A-Mattress Int'l, Ltd.*, 1 F.3d 639, 643 (7th Cir. 1993); *Barker v. Golf U.S.A., Inc.*, 154 F.3d 788, 793 (8th Cir. 1988); *Aspero v. Shearson American Express, Inc.*, 768 F.2d 106, 107 (6th Cir. 1985).

3. Neither does respondent meaningfully challenge PaineWebber's showing that the lower court's treatment of Ohio's "public policy" for intentional tort claims fits within the broader national trend of state common-law precedent that is hostile to arbitration in general and the FAA in particular. Respondent, to be sure, disputes (at 9) the relevance of *Seifert v. U.S. Home Corp.*, 750 So. 2d 633 (Fla. 1999) and *Ex parte Discount Foods Inc.*, 711 So. 2d 992, *cert. denied sub nom. Supervalu Inc. v. Discount Foods, Inc.*, 525 U.S. 825 (1998), *reconsidered in part*, 789 So. 2d 842 (2001). But he does so on the ground that those cases deal with other state "policy" exceptions to the FAA. That of course is not only a distinction without difference but also merely appreciates that state common law is becoming the new route for avoiding arbitration. And if a state judiciary may supersede the FAA merely by recitation of a state public policy or common-law doctrine, it matters not whether that policy addresses "intentional torts" or "theft" or, as the Alabama Supreme Court put it, simply a state preference for a "jury of . . .

peers." These state-defined "policies" and common-law decisions are boundlessly adaptable and have few, if any, logical limits.

4. Respondent likewise leaves unchallenged PaineWebber's position (at 14-16) that the question presented is one of national importance. Respondent implicitly acknowledges, for example, that the lower court opinion tends to undermine the enforceability of arbitration agreements across the fields of labor, maritime, securities, and commercial law. Respondent fails to dispute that residents of Ohio, Florida, Alabama, and Arizona, where there is conflicting state and federal court authority, will face particular uncertainty. And respondent even leaves unaddressed PaineWebber's showing that the "intentional tort" exception to the FAA, if retained, would encourage claim-splitting and wasteful multi-forum litigation. Whether measured in monetary terms, the number of cases affected or the impact on the judiciary, the question presented does indeed raise important national issues.

5. Having all but conceded a split of authority on the propriety of state common-law exemptions to the FAA and the importance of the question presented, respondent primarily opposes review on the ground that the lower court's decision was correct. Because state law determines whether parties had a meeting of the minds as to the existence of an arbitration clause, respondent argues (at 3) that the lower court had the power to conclude that no such meeting of the minds occurred with respect to the scope of the signed agreement. Not true.

a. To begin with, the "meeting of the minds" explanation does not readily apply here. There is no dispute about the existence of an arbitration agreement and no dispute that the arbitration agreement extended to "any and all controversies" arising from respondent's accounts. These uncontroverted facts alone make respondent's authorities (at 3-4) irrelevant. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), for example, considered whether an

arbitration agreement ever was entered into by parties who did not sign it. *Rosenblum v. Travelbyus.com Ltd.*, 299 F.3d 657, 664 (7th Cir. 2002), addressed only whether a party who agreed to an arbitration clause expressly limited to "this Agreement" could be required to arbitrate breach-of-contract claims arising under other contracts. Respondent's other federal cases consider either the creation of a contract or the waiver of arbitrability, but never its scope. *See Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99, 105 (3d Cir. 2000) (formation); *Three Valleys Mun. Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136 (9th Cir. 1991) (same); *Roney & Co. v. Kassab*, 981 F.2d 894 (6th Cir. 1992) (waiver); *Leadertex, Inc. v. Morganton Dyeing & Finishing Corp.*, 67 F.3d 20, 27 (2d Cir. 1995) (same). Neither of respondent's two cited Ohio state cases (at 7) involve arbitration clauses at all.

b. But even if there were a dispute about the scope of the arbitration agreement, it was not one for the state courts to address. The well-understood presumption that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983), has a corollary directly applicable here: When an arbitration contract is made, disputes concerning the "construction of the contract language itself" are themselves subject to arbitration. *Id.* at 25. *See also, e.g., Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995). And this requirement is particularly true where, as here, the arbitration agreement itself includes standard language that "any and all controversies which may arise . . . concerning . . . the construction . . . of this or any other agreement" are subject to arbitration. (*See* Pet. 3; Pet. App. 5a.)

c. Respondent's meetings of the minds theory fails for still another reason as well. With the conclusory assertion (at 6) that "the parties failed to reach a meeting of the minds to arbitrate claims involving theft," respondent suggests that

the state court had some basis to parse the phrase "any and all controversies" on a claim-by-claim basis. But that suggestion, like the lower court's reasoning, turns the pro-arbitration presumption of the FAA on its head. As the Court has noted, the type of claim pleaded should not "color the lens through which the arbitration clause is read." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). The touchstone, in other words, is the scope of the arbitration agreement, not the caption of the pleading.

6. Respondent's second argument (Opp. 8-11) is that his "theft" claim is *sui generis* and therefore unripe for review. That is wrong.

a. As an initial matter, respondent's attempt to frame this case as one of "theft" mischaracterizes his own pleadings. Respondent has sued only the brokerage firm and a supervisor, not the responsible broker, and respondent's theories all arise from an alleged failure-to-supervise.

b. Respondent also errs in characterizing his claims as "theft" rather than conversion. Under the law of Ohio and New York, "theft" is not a civil tort; conversion is. *Wolf v. Lakewood Hosp.*, 598 N.E.2d 160, 164 (Ohio App. 1991) ("The theft claim is nonexistent at civil law. Rather, the claim is rightfully termed as a tort of 'conversion.'"); *Jones v. Trump*, No. 96 CIV. 2995 (SAS), 1997 WL 277375, *6 n.9 (S.D.N.Y. May 27, 1997) ("Because New York common law does not recognize an independent tort of theft or larceny, I interpret plaintiff's claim for 'theft' to be one for conversion.") *Congregacion de la Mision Provincia de Venezuela v. Curi*, No. 96CV1914, 1998 WL 372468, *6 (E.D.N.Y. Apr. 24, 1998) ("When a defendant steals property belonging to the plaintiff . . . [t]he defendant becomes liable for the tort of conversion.")

c. Placing respondent's claims in their true light underscores the conflict between this lower court and other appellate bodies. Conversion and fraudulent concealment long

have been recognized as arbitrable claims under arbitration clauses identical in all material respects to the one at issue here. *Long v. Silver*, 248 F.3d 309, 314, 321 (4th Cir. 2001) (compelling arbitration where shareholder-employee alleged conversion of funds by insider for personal use); *Am. Express Financial Advisors, Inc. v. Makarewicz*, 122 F.3d 936, 939 n.3 (11th Cir. 1997) (finding "no reason to disagree" with the parties' contention that the FAA applied to a case which included a conversion claim); *PaineWebber, Inc. v. Faragalli*, 61 F.3d 1063, 1065 (3d Cir. 1995) (upholding district court's order to compel arbitration in case alleging, among other things, conversion and unjust enrichment); *Saari v. Smith Barney, Harris Upham & Co., Inc.*, 968 F.2d 877 (9th Cir. 1992) (finding that state-law claim of slander arising from public accusation of theft is subject to arbitration); *Kerr-McGee Refining Corp. v. M/T Triumph*, 924 F.2d 467, 471 (2d Cir. 1991) (upholding arbitration award arising from RICO and civil-conversion claims).

d. If anything, respondent's own authority—*Fazio v. Lehman Bros.*, No. 1:02CV157, 2002 U.S. Dist. LEXIS 15174 (N.D. Ohio July 19, 2002)—demonstrates that his "theft" claim is not unique, but instead a malleable tool that will keep many claims from arbitration. In *Fazio*, after all, the trial court used the lower court's opinion and "public policy" rationale in this case to conclude that the lower court's "theft" analysis also exempted from arbitration not just a claim pleaded as theft, but others including "fraud," "conversion," and "breach of fiduciary duty." (Opp. 12a.)

e. More, the lower court's effort to pare preferred claims out of the scope of an arbitration agreement has no bounds. Today, "theft" might be excluded. Tomorrow, claims that sound like theft—conversion, fraudulent concealment—might be exempted. Other allegations of serious, intentional, or quasi-criminal conduct then are cut loose, and soon enough, the parties' contract has been nullified by a state court in the interest of ever-changing state policy.

7. At all events, respondent's success in crafting the tort of "theft"—a success duplicated in *Fazio*—also underscores the susceptibility of federal arbitration policy to innovative state common law pleading. Having routinely rejected state legislatures' attempts to encroach on national arbitration policy, *see Doctor's Associates, Inc. v. Casaroto*, 517 U.S. 681, *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265 (1995), *Perry v. Thomas*, 482 U.S. 483 (1987), the Court should now establish that state courts may not do the same thing by a different name.

CONCLUSION

The Court should grant the petition or at a minimum the decision below should be summarily reversed.

Respectfully submitted,

JEFFREY S. SUTTON
Counsel of Record
JEFFREY J. JONES
DOUGLAS M. MANSFIELD
BRIAN G. SELDEN
JONES, DAY, REAVIS & POGUE
41 South High Street, Suite 1900
Columbus, Ohio 43215
(614) 469-3855

Counsel for Petitioners

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